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No. 1082

In the Supreme Court of the United States

OCTOBER TERM, 1944

GLASS CITY BANK OF JEANNETTE, PENNSYLVANIA, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 9–15) is reported at 54 F. Supp. 11. The opinion of the Circuit Court of Appeals (R. 19–22) is reported at 146 F. 2d 831.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 29, 1944 (R. 23). The petition for a writ of certiorari was filed on March 26, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether tax liens of the United States, under the provisions of Section 3671 of the Internal Revenue Code, attach to property rights accrued after the tax liens arose.

STATUTES AND TREASURY DECISION INVOLVED

The pertinent statutes and Treasury Decision involved are set forth in the Appendix, *infra*, pp. 11–15.

STATEMENT

The undisputed facts as found by the District Court may be briefly summarized as follows:

Frank A. Maddas was appointed equity receiver of the Victor Brewing Company in proceedings in the Court of Common Pleas, Westmoreland County, Pennsylvania, and served in that capacity from December 28, 1938, to October 22, 1940 (R. 10).

On October 4, 1940, a petition was filed in the United States District Court for the Western District of Pennsylvania, for a reorganization of the Victor Brewing Company under Chapter X of the Bankruptcy Act, as amended. On January 31, 1941, the debtor was adjudicated bankrupt. (R. 10.)

On June 13, 1941, Maddas filed an application for allowance of receiver's fees and was allowed

the total sum of $15,000 by the referee. He had received some payments which left a balance due of $3,228.53, which sum is held by the trustees in bankruptcy. (R. 10.)

On February 15, 1941, petitioner secured a judgment against Maddas in the Court of Common Pleas of Allegheny County, Pennsylvania, for $19,041.75. On February 21, 1941, without first securing leave of the bankruptcy court, petitioner issued an attachment-execution out of the state court summoning the bankruptcy trustees as garnishees. The trustees opposed these proceedings and filed an application in the United States District Court to enjoin the same. (R. 10–11.)

On April 2, 1942, the District Court enjoined the petitioner from proceeding with its attachment-execution (R. 11).[1] Later petitioner again sought leave to proceed, but on April 29, 1942, the application was denied.[2]

Prior thereto, on October 23, 1940, the District Court entered an order restraining all creditors of the debtor Victor Brewing Company (R. 11)—

> from interfering in any manner with the discharge by the trustees of their duties and the management of the business and property of the debtor, and from interfering in any manner during the pendency of this proceeding with the exclusive jurisdic-

[1] *In re Victor Brewing Co.*, 48 F. Supp. 905 (W. D. Pa.).
[2] *In re Victor Brewing Co.*, 48 F. Supp. 907 (W. D. Pa.).

tion of this Court over the debtor and such property and assets.

There are outstanding against Maddas, federal income taxes for the years 1920, 1921 and 1922, in the aggregate amount of $1,258,671 assessed on August 10, 1935. The Collector received the assessment lists on August 12, 1935, and made notices and demands on August 13 and 24, 1935. Notices of tax liens were filed on July 27, 1939, and July 29, 1939. (R. 12.) There are also outstanding against Maddas federal income taxes for 1936 in the sum of $9,129.72, assessed on January 17, 1941. The Collector received the assessment list on January 20, 1941.[3] Notices and demands were made on January 21, 1941, and February 3, 1941. Notices of tax liens were filed on April 4 and April 7, 1941. (R. 12.)

The case came before the District Court on certificate to review an order of the referee in bankruptcy dealing with the $3,228.53 awarded to Maddas as receiver of the Victor Brewing Company. The order directed the payment of an $800 note given by Maddas to the First National Bank of Greensburg, Pennsylvania, and ordered the balance of $3,228.53 to be paid to the Collector of Internal Revenue. The United States filed a petition to review this order, claiming that the

[3] The dates appearing in the record July 29, 1938, and January 20, 1943, are apparently typographical errors and should be as set out above.

entire $3,228.53 should be paid to the Collector. Petitioner, a claimant by reason of the attachment-execution (see Statement, *supra*, p. 2), also sought a review of this order, claiming the entire fund should be awarded to it. (R. 9–10.) The District Court held that the United States was entitled to priority over petitioner and the First National Bank of Greensburg, as to the entire fund (R. 16–17).[1] The Circuit Court of Appeals affirmed (R. 23).

ARGUMENT

The case was correctly decided and there is no occasion for further review.

The court below held that the federal tax liens for 1920, 1921, and 1922, which arose before the receiver's fees accrued, attached to those fees when Maddas, the taxpayer, acquired the right to the same. Notices of these tax liens were duly filed by the Collector under Section 3672 of the Internal Revenue Code (Appendix, *infra*, pp. 11–12) prior to petitioner's judgment and were therefore effective against judgment creditors. Petitioner does not claim priority if the liens attached to after-acquired property or rights to property, as we hereinafter contend.

After the liens for these taxes once arose, they continued by their own force under the provisions

[1] The First National Bank of Greensburg took no appeal.

of Section 3671 of the Internal Revenue Code (Appendix, *infra*, p. 11) "until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." This language has been consistently construed to mean that if the liens are to "continue" they attach to property either owned by or which may be later acquired by the taxpayer. *Citizens Nat. Trust & S. Bank of Los Angeles* v. *United States*, 135 F. 2d 527 (C. C. A. 9th); *Nelson* v. *United States*, 139 F. 2d 162 (C. C. A. 9th), certiorari denied, 322 U. S. 764; *Investment & Securities Co.* v. *United States*, 140 F. 2d 894 (C. C. A. 9th).[5]

Petitioner in its brief (Pet. 15–19) urges that the decision below conflicts with *United States* v. *Long Island Drug Co.*, 115 F. 2d 983 (C. C. A. 2d). In that case the United States sued the defendant Drug Company to enforce the statutory penalty provided in Section 3710 of the Internal Revenue Code (Appendix, *infra*, p. 13) for refusal to surrender property or rights in property subject to distraint. It was contended that

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[5] See also *United States* v. *Worley* (S. D. Ind.), decided March 8, 1940 (1940 C. C. H. par. 9694); *Graves* v. *Commissioner*, 12 B. T. A. 124, 132–133; *Matter of Rosenberg*, 269 N. Y. 247, 199 N. E. 206, certiorari denied, 298 U. S. 669; *United States* v. *Canfield*, 29 F. Supp. 734 (S. D. Cal.), appeal dismissed *sub nom. Security First Nat. Bank of Los Angeles* v. *United States*, 113 F. 2d 491 (C. C. A. 9th); *Minnesota Mut. Life Ins. Co.* v. *United States*, 47 F. 2d 942 (N. D. Tex.); T. D. 4275, VIII–2 Cum. Bull. 167 (1929) (Appendix, *infra*, pp. 14–15); G. C. M. 4715, VII–2 Cum. Bull. 94 (1928).

the defendant employer had refused to surrender to the Collector wages due defendant's employee Steinberg against whom federal tax liens were outstanding. The undisputed facts there showed that when the tax liens arose and the first notice and demand were made on April 15, 1936, the defendant owed Steinberg no wages, and the court held that the contingent right of the taxpayer to receive future wages did not create a property right in the possession of the employer. Although the opinion may say that liens do not attach to after-acquired property,[6] that was not the basis of the decision. The decision was rested on the ground that the employer's obligation under Section 3710 (Appendix, *infra*, p. 13) did not arise unless the employer held property of the taxpayer on the very day that the Collector's demand was made. Thus the decision would have been the same even if the court had been of the view that tax liens do attach to after-acquired property. Furthermore, the Second Circuit did not discuss Section 3671 of the Internal Revenue Code in its opinion. We submit that the cases are therefore distinguishable. This was recognized by the court below and in *Citizens Nat. Trust & S. Bank of Los Angeles* v. *United States*, 135 F. 2d

[6] The court's language was (115 F. 2d at p. 986): "Rights which do not exist at the time of the demand upon the taxpayer are not subject to any lien. United States v. Pacific R. R., C. C. Mo., 1 F. 97." We have discussed that case, *infra*, pp. 8–9.

527 (C. C. A. 9th). *United States* v. *Warren R. Co.*, 127 F. 2d 134 (C. C. A. 2d), was a similar case under Section 3710 of the Internal Revenue Code. There the taxpayer's inability to recover rents which had not accrued resulted in a holding that the lessee held no property of the taxpayer on the day of the levy and thus the derivative right of the United States could not be recognized. However, the court held that because the United States did have tax liens against the lessor it was entitled to an injunction restraining the lessee from paying future rentals to the lessor's stockholders. Hence the court necessarily concluded that the liens attached to after-acquired property. Otherwise it would not have restrained the lessee in order to permit the Collector to levy on the property rights in rentals.

Petitioner asserts (Pet. 4) that the lower court's decision conflicts with *United States* v. *Western Union Telegraph Co.*, 50 F. 2d 102 (C. C. A. 2d). The statement in that case restricting the tax lien to tangible property only has generally been repudiated by the courts and in the later case of *United States* v. *Long Island Drug Co.*, 115 F. 2d 983, 986 (C. C. A. 2d), the court referred to this dictum as being "based on a too narrow reading of the statute and cannot be taken as authoritative."

The case of *United States* v. *Pacific Railroad*, 1 Fed. 97 (C. C. E. D. Mo.) (see fn. 6, *supra*,

p. 7), is not in point, since it did not involve an after-acquired property question and was decided under a statute containing substantially different provisions than here involved. See *Citizens Nat. Trust & S. Bank of Los Angeles* v. *United States*, 135 F. 2d 527, 529–530 (C. C. A. 9th).

Petitioner asserts (Pet. 32–35) that more than six years elapsed from the date of assessment of the taxes for 1920, 1921 and 1922, and that therefore under Section 276 (c) of the Internal Revenue Code (26 U. S. C. Sec. 276 (c)) the Government lost its lien. Petitioner raised no question either in the District Court or the Circuit Court of Appeals as to the insufficiency or invalidity of consents or waivers executed by Maddas extending the period of the statute of limitations.[1] The evidence taken before the referee is not incorporated in the record in this Court. Petitioner waived any question as to the validity of the tax waivers by not presenting the issue in the courts below. *Sonzinsky* v. *United States*, 300 U. S. 506; *New York Dock Co.* v. *Poznan*, 274 U. S. 117.

Even if petitioner should prevail on the questions raised in its petition, it would be confronted with tax liens for 1936 which arose after the receiver's fees accrued and concerning which no

[1] At the hearing before the referee the Government introduced in evidence tax waivers executed by Maddas extending the statute of limitations beyond the hearing date and clearly showing that these taxes were not barred.

question of after-acquired property is involved.* The District Court held that aside from the liens for 1920, 1921, and 1922, the Government was entitled to priority over petitioner because petitioner's unauthorized attachment gave it no rights in the fund and also because petitioner had no right to garnish the receiver's fees under Section 886, Purdon's Pennsylvania Statutes, Title 42 (Appendix, *infra*, pp. 13–14). The Circuit Court of Appeals did not pass on these questions although it expressed the view that it was highly doubtful whether any right to garnish the fees existed under the statute (R. 22).

CONCLUSION

The decision is correct and there is no conflict. The petition should therefore be denied.

Respectfully submitted.

HUGH COX,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J LOUIS MONARCH,
HOMER R. MILLER,
Special Assistants to the Attorney General.
WALTER J. CUMMINGS, JR.,
Attorney.

APRIL 1945.

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* These liens are for $9,129.72 (R. 12), and only $3,228.53 was due Maddas as receiver's fees (R. 9).

APPENDIX

Internal Revenue Code:

SUBCHAPTER B—LIEN FOR TAXES

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (26 U. S. C. Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. (26 U. S. C. Sec. 3671.)

SEC. 3672. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

[As amended by Sec. 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862.]

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In accordance with the law of the State or

Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to lien is situated in the District of Columbia.

(b) * * * * *

(3) *Applicability of Subsection.*—Except where the lien has been enforced by a proceeding, suit, or civil action which has become final before the date of enactment of the Revenue Act of 1939, this subsection shall apply regardless of the time when the mortgage, pledge, or purchase was made or the lien arose. (26 U. S. C. Sec. 3672.)

SEC. 3692. LEVY.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and

expenses of such levy. (26 U. S. C. Sec. 3692.)

SEC. 3710. SURRENDER OF PROPERTY SUBJECT TO DISTRAINT.

(a) *Requirement.*—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

(c) *Person Defined.*—The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. (26 U. S. C. Sec. 3710.)

Purdon's Pennsylvania Statutes, Title 42:

SEC. 886. ENTRY OF JUDGMENT ON ADMISSION OF ASSETS.

If the garnishee in his answers admit that there is in his possession or control property of the defendant liable under

said act to attachment, then said magistrate may enter judgment specially, to be levied out of the effects in the hands of the garnishee, or so much of the same as may be necessary to pay the debt and costs: Provided however, That the wages of any laborers, or the salary of any person in public or private employment, shall not be liable to attachment in the hands of the employer. (1845, April 15, P. L. 459. Sec. 5.)

T. D. 4275, VIII–2 Cum. Bull. 167 (1929):

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 3186 of the Revised Statutes, as amended, is further amended by section 613 (entitled "Lien for taxes") of the Revenue Act of 1928 to read as follows:

* * * * * *

In accordance with the provisions of subsections (c) and (e), *supra*, the following regulations are hereby prescribed:

The collector of internal revenue to whom is charged an assessment in respect of any internal-revenue tax shall issue a certificate of release of the tax lien whenever he finds that the liability for the amount assessed (together with all interest in respect thereof) has been satisfied or has become unenforceable. The word "unenforceable" as here used means unenforceable as a matter of law, and not merely uncollectible or unenforceable as a matter of fact. Tax liabilities frequently are unenforceable in fact for the time being, due

to the temporary nonpossession by the taxpayer of discoverable property or property rights. In all cases the liability for the payment of the tax continues until satisfaction of the tax in full or until the expiration of the statutory period for collection, including such period as the taxpayer by consent in writing may agree with the Commissioner shall constitute the time within which the tax assessed may lawfully be collected. Collectors should continue to investigate carefully all cases of delinquent taxpayers where notice of lien has been filed, with a view of obtaining, before the expiration of the collection period, such written consent for the extension of the collection period, whenever it is reasonably possible that the taxpayer may, in the future, acquire property or property rights from which the tax liability may be satisfied.

* * * * *

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